84-663

No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARK G. MINNIS,
PETITIONER

v.

THE UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 15, 1984

QUESTION PRESENTED

Whether the Government is collaterally estopped, from litigating whether disclosure of the the names and addresses of 1983 recipients of Forest Service permits to float the Rogue River in the State of Oregon would constitute a clearly unwarranted invasion of personal privacy, by the 1981 judgment of The United States District Court for the District of Oregon which held, as one of two alternative and independent grounds for its judgment, that disclosure of the 1981 recipients was not "clearly unwarranted" under the Freedom of Information Act, 5 U.S.C. § 552(b)(6).

PARTIES TO THE PROCEEDING

Other parties, in addition to those named in the caption are R. Max Peterson, Chief of the United States Forest Service, R.E. Worthington, Regional Forester of

Region 6, United States Forest Service, and William E. Butler, District Ranger, Galice Ranger District, United States Forest Service.

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OCTOBER TERM, 1984

No.

MARK G. MINNIS,

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UNITED STATES DEPARTMENT

OF AGRICULTURE, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mark G. Minnis petitions for a Writ of Certiorari to review the judgment of The United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. ___, infra) is reported at 737 F.2d 784. The 1983 Order of the District Court in this lawsuit (App. ___, infra) is not reported. The 1981 Order of the District Court in the prior lawsuit (App. ___, infra) is not reported.

JURISDICTION

The judgment of the court of appeals was entered May 22, 1984 (App. ___, infra) and a petition for rehearing and suggestion for rehearing en banc was denied on July 18, 1984 (App. ___, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Subsection (b)(6) of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), provides:

> (b) This section does not apply to matters that are--
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; * * *

STATEMENT

This Freedom of Information Act ("FOIA") suit arose out of a request by petitioner Mark G. Minnis for the names and addresses of the applicants for permits to float the Rogue River during 1983. The Forest Service denied the FOIA request on the basis of Exemption 6 of the Act, which protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

The petitioner filed a motion for summary judgment contending, in part, that the Government was collaterally estopped

from relitigating its duty to disclose the names and addresses of the permit recipients. This issue was decided in 1981 by the United States District Court in the District of Oregon.

In 1980 Minnis made an FOIA request for the names and addresses of the 1980 permit recipients. Each year the Forest Service conducts a "secret lottery" to award prized permits to lucky applicants. Without a permit it is unlawful to float the Rogue River from Memorial Day through Labor Day. The Forest Service denied his 1980 request on the same ground, Exemption 6. The parties fully briefed and argued both prongs of Exemption 6: 1) whether the names and addresses of the 1980 permit recipients were "similar" to medical or personnel files, and 2) would disclosure constitute a clearly unwarranted invasion of the personal privacy of the permit recipients? The district court granted

Minnis' motion for summary judgment, holding in favor of Minnis on both prongs, and entered judgment in 1981 requiring the Government to disclose the names and addresses of the 1980 permittees. The Government appealed from the 1981 judgment but unilaterally dismissed its appeal before the Ninth Circuit could rule on the merits. The Forest Service disclosed the names and addresses of the permit recipients for 1981 and 1982.

Because of this Court's decision in Department of State v. Washington Post Co., 456 U.S. 595 (1982), Petitioner no longer contended in 1983 that the names and addresses were not "similar files." The 1983 lawsuit revolved around the issues of collateral estoppel and whether disclosure would constiute a clearly unwarranted invasion of personal privacy.

The Government argued in the district court that the doctrine of collateral

estoppel did not apply because the 1981 judgment applied only to recipients of permits and not to applicants as plaintiff requested in 1983. The district court held that the facts and issues presented in 1983 were not the same as in 1980 since the 1980 request concerned permit recipients while the 1983 request concerned permit applicants. While the district court held collateral estoppel was not applicable, it held that disclosure of the names and addresses would not constitute a clearly unwarranted invasion of personal privacy and ordered disclosure of the names and addresses of the 1983 applicants.

The Government appealed the 1983 judgment. Petitioner again asserted collateral estoppel as support for that portion of the district court's judgment holding disclosure of the names and addresses of the 1983 permittees would not constitute a clearly unwarranted invasion

of personal privacy. The Ninth Circuit reversed the district court, finding that disclosure of the names and addresses of the 1983 applicants would constitute a clearly unwarranted invasion of personal privacy. The Ninth Circuit rejected application of collateral estoppel based upon its misconception of the district court's ruling. The Ninth Circuit mistakenly believed that the district court had never addressed whether disclosure of the 1980 permittees would constitute a clearly unwarranted invasion of personal privacy.

Petititoner filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was rejected on July 18, 1984. The order rejecting the Petition for Rehearing amended the May 22, 1984 opinion of the Ninth Circuit by deleting the statement that the district court had not considered whether disclosure of the 1980 permittees would constitute a clearly unwarranted

invasion of personal privacy. However, rather than reconsidering its rejection of collateral estoppel, the Ninth Circuit added the following:

> Minnis also suggests that the Forest Service is collaterally estopped from relitigating the 'clearly unwarranted' issue. The district court in the earlier action did note its view that disclosure of the list of all permit recipients would not be clearly unwarranted. However, the district court also recognized that it was unnecessary for it to address that issue. Because the district court's expression of its view regarding the issue was dictum, the Forest Service is not collaterally estopped from relitigating the 'clearly unwarranted' question. Moreover, the earlier question pertained to permit recipients while the issue before us relates to permit applicants. For that reason also, collateral estoppel is inapplicable.

The Ninth Circuit did not ask for, and the parties did not brief the issue of whether collateral estoppel will apply to a judgment resting upon alternative grounds, either of which would be sufficient to independently support the judgment.

The parties agree that only permit applicants may receive permits. Petitioner's 1983 FOIA request was not phrased as an "all the applicants or nothing" request. Petitioner requested:

> the names and addresses of the private permit trip applicants for the 1983 regulated Rogue River season. . .
>
> The information is not exempted from required disclosure under present interpretations of the Act, as you are aware from the decision in the matter of Mark G. Minnis v. United States Department of Agriculture, R. Max Peterson and R.E. Worthington, Civil No. 80-1138, U.S. District Court for the District of Oregon. . .
>
> If any portion of this request is deemed denied, I request a detailed statement for the reasons for the withholding.
> . . .
>
> If you withhold any portion of the requested information, you are requested to disclose and provide the balance of the requested information.

The Act also expressly contemplates segregation and disclosure of nonexempt portions of a request:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

5 U.S.C. § 552(b). See also, Department of the Air Force v. Rose, 425 U.S. 325 (1976).

The Ninth Circuit cited no authority for its narrow interpretation of Petitioner's request to be for 1983 permit applicants only, to the exclusion of 1983 permit recipients. The Government cited no authority in support of this unique "all or nothing" approach adopted by the Ninth Circuit.

The Government has never contended that the district court's holding that disclosure of the 1980 permittees would not constitute a clearly unwarranted invasion of privacy, was unnecessary to the 1981 judgment. The Government has not contended that following the 1981 judgment there was a change in the applicable law with respect to the determination of whether a clearly

unwarranted invasion of personal privacy would result from disclosure. The Government has not contended that new evidence exists, which was unavailable to the Government at the time of the 1980 lawsuit, and which would have been determinative of the outcome of the 1980 lawsuit if the district court had been presented with the evidence.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the application of collateral estoppel to judgments resting on alternative grounds, each of which is independently sufficient to sustain the judgment. In its holding in this case, the Ninth Circuit, without the benefit of briefing by the parties, ruled in harmony with a minority view that collateral estoppel does not apply to judgments based on independent and alternative grounds, even

if all grounds for the judgment are actually litigated. Relatively recently a conflict amongst the circuits and within the Second Circuit has developed as to the application of collateral estoppel to such a situation. The issue hinges on whether each of the alternative bases for a judgment is actually necessary to the judgment if an independent basis for the judgment also exists.

The implications of the application of collateral estoppel to such judgments affects the certainty, and finality, and redundency of litigation, and the burden on trial and appellate courts.

Alternative grounds for judgments are not unusual. Trial courts often reach decisions on issues which would uphold the basis for the judgment even if another aspect of the court's findings were overturned on appeal. The district court did so here in 1981. This promotes judicial economy by obviating retrial even if the trial

court is in error on one ground for the judgment.

It is impractical, uneconomical, and unfair that a litigant who prevails on but one theory and obtains a judgment on that theory can assert collateral estoppel to preclude relitigation of the decided issue by the same parties at a later time, while the litigant who asserts two independent theories, each of which are adopted and each of which would support a judgment, cannot assert collateral estoppel as to either issue. The wisdom of such a rule of law, while adopted by the Restatement (Second) of Judgments, has been heavily criticized.

The implications of this rule of law are widespread, and deserve resolution by this Court.

Until the decision in Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970), it had been the well-settled rule that

collateral estoppel did apply to judgments resting on independently sufficient determinations. In Halpern the Second Circuit reconsidered this long-settled rule and carved out an exception to the rule in bankruptcy cases based upon facts similar to those in Halpern. While the facts in Halpern are not at all analogous to those of the instant case, the reasoning of the Second Circuit is important. The Court advanced two reasons for not applying collateral estoppel under the circumstances of the Halpern case: (1) If the court were sure as to one of the alternative grounds and this ground were alone sufficient to support the judgment, other grounds for the judgment may not receive as rigorous consideration, (2) vigorous review of an asserted error as to one ground for the judgment would be less likely to occur since even if there were error as to one basis for the judgment, the judgment would be

affirmed as to the other grounds and the motivation for appeal would be diminished.

The instant case demonstrates the folly of such a general rule. Here, the district court carefully considered both grounds for its 1981 judgment after vigorous briefing and argument by both sides on both grounds. And here, a timely appeal of the 1981 judgment may have obviated the need for this second lawsuit and its consequent burden on the parties' and the judiciary's resources.

In 1977, when Tentative Draft No. 4 of the Restatement (Second) of Judgments was published, the Halpern decision was the most recent judicial examination of the effect of judgments resting on independently sufficient grounds. Comment (e) to Section 20 of the Restatement (Second) applies the Halpern reasoning and abandons the former rule that collateral estoppel applied to all of the independent grounds

for a judgment. The Halpern ruling has been limited and criticized by numerous courts, including the Second Circuit itself.

The Second Circuit in Williams v. Ward, 556 F.2d 1143 (2nd Cir. 1977) noted that the Halpern court limited its decision to "the facts before us" 426 F.2d 105. The Williams court distinguished the Halpern decision on the basis that in Halpern one of the bases for the judgment was on an issue not essential and which may not have been afforded careful deliberation, whereas in the Williams case both bases for the judgment were litigated at the same time and had apparently been afforded the careful deliberation and analysis normally associated with a judgment. The Williams court did not vary from the traditional rule that res judicata applied to all of the bases for the judgment.

A year later, in Winters v. Levine, 574 F.2d 46, (2nd Cir. 1978), the Second

Circuit stated that Halpern was not intended to have "broad impact outside the specific context, bankruptcy proceedings, in which the issue was presented there. . ." Winters at 574 F.2d 67. The Winters court abided by the traditional rule that collateral estoppel will apply to alternative grounds for a judgment and refused to apply the rule applied in Halpern and by the Ninth Circuit in this case. The Winters court confined the Halpern rule to "narrow circumstances" and stated the traditional rule "has continuing viability in circumstances divergent from those in Halpern." Winters at 67. Significantly, Judge Waterman was a member of both the Halpern and the Winters panels.

The District of Columbia Circuit recognized the split of authority over the res judicata and collateral estoppel effect of alternative and independent bases for a judgment in Dozier v. Ford Motor Co., 702

F.2d 1189 (1983). It characterized the problem as follows:

> A rule declining to accord res judicata effect to an alternate ground must of course apply to both grounds, which would mean that a case which is doubly inadequate can be refiled whereas a case inadequate in only one respect cannot. On the other hand, a rule which give res judicata effect to both grounds leaves the losing party who concedes the adequacy of one no appellate remedy for the patent invalidity of the other except a frivolous appeal.

702 F.2d at 1194.

The facts in Dozier, however, did not require a resolution of the problem by the District of Columbia Circuit.

In Huntley v. United States, 4 Ct. Cl. 65 (1983), the split of authority was again recognized. The Court of Claims noted the limitation of Halpern by the Second Circuit, and the disapproval it has received, and itself declined to follow the Halpern rule.

Legal scholars have also condemned the rule pronounced in Halpern, and adopted

by the Restatement (Second), as inefficient, often unfair, and promoting uncertainty in litigation where finality is essential. J. Lucas, The Direct and Collateral Estoppel Effects of Alternative Holdings, 50 U. Chi. L. REV. 701 (1983).

The fact that 1980 names and addresses may not be the same as those in 1983 is not a bar to the application of collateral estoppel since the same legal and factual issues are present. Commissioner v. Sunnen, 333 U.S. 591 (1947); Union Carbide Corp. v. C.I.R., 671 F.2d 67 (2nd Cir. 1982).

In Sunnen, this Court considered the application of collateral estoppel to relitigation of the same income tax issues in succeeding tax years. This Court held that even though a new tax year was involved, and new income was involved, collateral estoppel may still be applicable, even though res judicata was not:

> These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus, if a claim of liability or nonliability relating to a particular tax year is litigated, a judgment on the merits is res judicata, as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit. Collateral estoppel operates in other words to relieve the Government and the taxpayer of "redundant litigation of the identical question of the statute's application to the taxpayer's status. (Citations omitted)

333 U.S. at 598-599.

Thus, the mere fact that a different tax year was involved and different dollars were received by the taxpayer as income, collateral estoppel applied if the controlling facts and applicable laws remained unchanged:

> And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.

Id., at 599-600

In Union Carbide, supra, the IRS contested the taxpayer's consolidated foreign tax credit for the 1971 tax year. The same issue had been litigated between the two parties regarding the taxpayer's 1967 tax liability. The Court held collateral estoppel prevented relitigation of the issue:

> We decline to reverse and we affirm the application of collateral estoppel to the facts of this case on the reasoning of Judge Tannenwald's opinion. We agree with the Tax Court that recent decisions, particularly Montana v. United States, 440 US 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), indicate that it is appropriate to invoke collateral estoppel here to bar the Commissioner from relitigating with the same taxpayer the

> precise issue on which the Commissioner has already lost for a prior year.

Union Carbide, supra, at 68

The same reasoning and result applies to the instant case. The nature of the requested information remains unchanged from the 1980 litigation. The fact that the names and addresses may have changed is irrelevant to the application of collateral estoppel, just as the fact that the taxpayers received new income in different tax years was irrelevant in Sunnen and Union Carbide. Insofar as the names and addresses of the successful permit applicants is concerned, there have been no factual changes and no changes in the applicable law which would affect the outcome of the case. Defendants were obligated to segregate and disclose the names and addresses of the 1983 permittees. 5 U.S.C. § 552(b).

The Ninth Circuit's ruling that collateral estoppel cannot apply to any of

two or more independent grounds for a judgment was made without briefing by the parties and without significant discussion of the issue. The ruling will add weight to the Restatement (Second) position. The effect of a widening application of such a rule will be to create a dramatic change in the heretofore settled law of collateral estoppel and res judicata, resulting in uncertainty in litigation due to a lack of finality, an excessive burden upon the courts from repetitious litigation, and outright unfairness. It will promote situations, such as the instant case, where an unsuccessful litigant will be given unlimited bites at the apple. It will promote justice for the rich at the expense of financially less able who are unable to repeatedly litigate an issue over and over again.

CONCLUSION

The judgment of the Ninth Circuit should be reversed and the case remanded for entry of judgment in favor of the Petitioner directing disclosure of the names and addresses of the 1983 permittees.

Dated: October 15, 1984

Respectfully submitted,

Thomas E. Cooney
Counsel of Record
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Of Attorneys for Petitioner

Appendix

Order Denying Petition
For Rehearing and Rejecting
the Suggestion For Rehearing
En Banc, Filed
July 18, 1984 . . . . . App. 2

Opinion of The Ninth Circuit
Court of Appeals, Filed
May 22, 1984 . . . . . App. 4

Opinion and Order of the
United States District
Court, June 6, 1983 . . . . . App. 16

Judgment Order of the United
States District Court For
The District of Oregon,
Filed August 15, 1983 . . . . . App. 30

Judgment Order of The United
States District Court For
The District of Oregon. . . . . App. 34

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK G. MINNIS, Plaintiff-Appellee-Cross-Appellant, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al. Defendants-Appellants-Cross Appellees.	)	No. 83-4089/4209 DC # 83-469-FR (District of Oregon) ORDER

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The opinion filed on May 22, 1984 shall be amended by deleting the third sentence from footnote 1: "The district court never addressed whether disclosure would be 'clearly unwarranted.'" and adding to the end of footnote 1 the following paragraph:

> Minnis also suggests that the Forest Service is collaterally estopped from relitigating the "clearly unwarranted" issue. The district court in the earlier action did note its view that disclosure of the list of all permit recipients would not be clearly unwarranted. However, the district court also recognized that it was unnecessary for it to address that issue. Because the district court's expression of its view regarding the issue was dictum, the Forest Service is not collaterally estopped from relitigating the "clearly unwarranted" question. Moreover, the earlier question pertained to permit recipients while the issue before us relates to permit applicants. For that reason also, collateral estoppel is inapplicable.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK G. MINNIS, Plaintiff-Appellee, v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al. Defendants-Appellants.	)	No. 83-4089-4209
	)	DC # 83-469-FR
	)	OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding
Argued and submitted March 5, 1984

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

SCHROEDER, Circuit Judge.

Mark G. Minnis owns a commercial lodge on the bank of the Rogue River in Oregon. He filed this action under the Freedom of Information Act, 5 U.S.C. § 552 (1982)(FOIA), to compel the Forest Service to disclose the names and addresses of all persons who applied for permits to travel on

the Rogue River during the 1983 regulated season. The Rogue River is a designated wild and scenic river under the Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1287 (1982), and the Forest Service restricts traffic on it between Memorial Day and Labor Day by requiring all persons to obtain permits through a random computer lottery. Approximately 9,370 people applied for permits for the 1983 regulated season, and 639 permits were awarded.

The Forest Service denied Minnis's request for the permit applicant list on the basis that disclosure would violate the privacy exemption to FOIA, 5 U.S.C. § 552(b)(6). Minnis then filed this action. The district court concluded, on the basis of facts that were not materially disputed, that there was a strong public interest in Minnis informing permit applicants about available accommodations on the River, and that release of the list

to Minnis would entail no more than a minimal invasion of privacy. It ordered disclosure plus an award of attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E). We stayed action pending this appeal and now reverse because we conclude that disclosure would confer no discernible public benefit and would entail more than a minimal invasion of privacy.

FOIA's privacy exemption applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To fall within the exemption, the information requested must be contained in a personnel, medical, or similar file. The Supreme Court has defined "similar file" broadly as government records containing "information which applies to a particular individual." United States Department of State v. Washington Post Co., 456 U.S. 595, 602

(1982.[1/] See Washington Post Co. v. United States Department of Health and Human Services, 690 F.2d 252, 260 (D.C. Cir. 1982). Lists of names and addresses meet this definition. Van Bourg, Allen, Weinberg & Roger v. NLRB, No. 83-1722, slip op. at 1490 (9th Cir. March 22, 1984); see also Wine Hobby USA, Inc. v. United States Internal Revenue Service, 502 F.2d 133, 135 (3d Cir. 1974). The issue here, therefore, is whether release of the information requested would be a clearly unwarranted invasion of personal privacy. United States Department of State v. Washington Post Co., 456 U.S. at 602.

To determine whether an invasion of privacy is clearly unwarranted, this court balances four factors: (1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of any alternate means of

obtaining the requested information. Van Bourg, Allen, Weinberg & Roger v. NLRB, slip op. at 1490; Church of Scientology of California v. United States Department of the Army, 611 F.2d 738, 746 (9th Cir. 1979). Even though we construe exemptions from FOIA disclosure narrowly, Department of the Air Force v. Rose, 425 U.S. 352, 361-62 (1976), the balance here weighs against release of the information.

Minnis's principal interest in obtaining the permit applicant list is purely commercial in character. He wants to advertise his lodge to people who are interested in visiting the Rogue River. At least one other circuit has considered such a commercial interest in the context of the privacy exemption. Wine Hobby USA, Inc. v. United States Internal Revenue Service, 502 F.2d 133 (3d Cir. 1974). In Wine Hobby, a distributor of wine-making equipment requested the names and addresses of

persons registered with the United States Bureau of Alcohol, Tobacco and Firearms to produce wine for family use. The court denied the request, reasoning that Congress did not intend FOIA to allow the disclosure of names of potential customers to commercial businesses. Id. at 137. The court concluded that, absent any asserted public interest in disclosure, a commercial interest would not justify the invasion of privacy. Id. See also HMG Marketing Associates v. Freeman, 523 F. Supp. 11, 14 (S.D.N.Y. 1980) (list of people who ordered specially minted silver sollars exempt from disclosure to direct mail advertiser because court "hard pressed" to discern any public interest in advertiser's acquisition of the mailing list).

We agree with the Third Circuit that commercial interest should not weigh in favor of mandating disclosure of a name and address list. Congress designated FOIA

"to ensure an informed citizenry . . . needed to check against corruption and to hold the governors accountable to the governed," NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978), and "to open agency action to the light of public scrutiny." Department of the Air Force v. Rose, 425 U.S. at 361. FOIA was not intended to require release of otherwise private information to one who intends to use it solely for personal gain.

Minnis attempts to distinguish Wine Hobby by arguing that disclosure of the list would benefit the public in two ways: first, because it would inform interested people of available accommodations on the River; and second, because the list would allow Minnis to verify the fairness of the permit lottery system.

In assuming that the public would benefit from the receipt of his direct mail advertising, Minnis ignores the possibility

that some members would be irritated rather than enlightened by unwanted solicitations. See Rowan v. United States Post Office Department, 397 U.S. 728, 736 (1970). Moreover, Minnis can communicate his lodge's availability to those who are interested by advertising in specialty publications, contacting local Chambers of Commerce, or obtaining a listing in the telephone yellow pages. Thus, he has not shown that government disclosure of this list is needed to inform the interested public. Use of the list for advertising purposes confers no public benefit weighing in favor of disclosure.

Minnis is on stronger ground in arguing that there is a public benefit in allowing outside scrutiny of the permit lottery's fairness. See Department of the Air Force v. Rose, 425 U.S. at 360-62; EPA v. Mink, 410 U.S. 73 (1973). The difficulty is, however, that the information Minnis

seeks would not further such an objective. The Forest Service submitted an uncontradicted affidavit that disclosure of names and addresses alone would not enable Minnis to assess the fairness of the lottery; he also wuld need other information, including the size of the parties, the types of craft, and the dates requested; Minnis has not asked the Forest Service for this information. The district court itself observed that Minnis had not explained how disclosure would help him oversee the lottery's fairness. Thus, we must conclude that there is little or no public interest served by disclosure of the information sought.

Against the asserted private and public interest in disclosure, which is negligible, we must balance the degree of invasion of ther permit applicants' privacy interests. Disclosure would reveal not only the applicants' names and addresses, but also their personal interests in water

sports and the out-of-doors. See Wine Hobby, 502 F.2d at 137. Other commercial advertisers could obtain the list, subjecting the applicants to an unwanted barrage of mailings and personal solicitations. Id. See American Federation of Government Employees Local 1923 v. United States Department of Health and Human Services, 712 F.2d at 931, 932 (4th Cir. 1983). Thus, contrary to the district court's conclusion, disclosure would implicate more than a minimal privacy interest. Indeed, this court recently recognized the privacy interest in a name and address list in Van Bourg, Allen, Weinberg & Roger v. NLRB, supra, involving a rival union's request for the list of eligible voters in a representation election. Slip op. at 1488. In allowing disclosure, this court emphasized that the parties to the election already had a copy of the list, slip op. at 1491, and that the public would benefit from

ensuring the fairness of union elections. Id. The factors militating in favor of disclosure in that case do not exist here.

While we note that Minnis had no alternative means for obtaining the exact list he requests, Church of Scientology of California, 611 F.2d at 746, this factor alone is not determinative, particularly since alternative means exist to further the commercial interest for which the information is sought. Minnis's interest in obtaining the list is commercial; no discernible public benefit would result from disclosure; and more than a minimal privacy interest is involved. We conclude that the invasion of privacy here is "clearly unwarranted." 5 U.S.C. § 552(b)(6). Accordingly, we reverse the judgment of the district court and the award of attorney fees to plaintiff.

FOOTNOTE

1/ Minnis filed an action for the list of all permit recipients prior to United States Department of State v. Washington Post Co., 456 U.S. 595 (1982). The district court in the earlier action ordered disclosure on the basis that names and addresses were not a "similar file." The district court never addressed whether disclosure would be "clearly unwarranted." Minnis's argument that the Forest Service is collaterally estopped from relitigating the "similar file" issue, however, lacks merit. It has long been the rule in this circuit that an intervening Supreme Court decision clarifying an issue that had been uncertain in the lower courts defeats collateral estoppel. See Segal v. American Telephone & Telegraph Co., 606 F.2d 842, 845-46 (9th Cir. 1979).

UNITED STATEDS DISTRICT COURT

DISTRICT OF OREGON

MARK G. MINNIES, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, R. MAX PETERSON individually and as Chief, United States Forest Service; R. E. WORTHINGTON, individually and as Regional Forester, Region 6, United States Forest Service; and WILLIAM E. BUTLER, individually and as District Ranger, Galice Ranger District, United States Forest Service Defendants.	)	Civil No. 83-469-FR OPINION AND ORDER

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FRYE, Judge:

This matter is before the court on cross motions for summary judgment. Plaintiff seeks disclosure under the Freedom of Inforamtion Act, 5 U.S.C. § 552, of the names and addresses of private permit trip applicants for the 1983 regulated Rogue River season. Defendants have previously disclosed to plaintiff the names and addresses of private permit trip recipients for the years 1981 and 1982, pursuant to this court's order of April 16, 1981 in a previous case, Minnis v. U.S. Dept. of Agriculture, et al., Civil No. 80-1138. Plaintiff's request for information this year was denied by defendants pursuant to Exemption 6 of FOIA, 5 U.S.C. § 552(b)(6), which protects against disclosure of information which would constitute a clearly unwarranted invasion of personal privacy. Plaintiff contends that defendants are barred by collateral estoppel from relitigating this issue which was decided in the

previous lawsuit and that the court's order of April 16, 1981 compels defendants to disclose the requested information. Defendants contend that the undisputed facts of this case differ from the facts of the previous case and that under the new facts and recent case law, judgment should be granted in their favor.

SUBJECT MATTER JURISDICTION

Defendants argue that because plaintiff did not appeal the Forest Service's denial of this request, he failed to exhaust his administrative remedies and this court therefore lacks subject matter jurisdiction. 5 U.S.C. § 552(a)(6)(A)(i) requires agencies to determine whether to comply with a request within ten days of its receipt and to notify the person making the request immediately. 5 U.S.C. § 552(a)(6)(C) provides that a person making a request shall be deemed to have exhausted his administrative remedies with respect to

that request if the agency fails to comply within the applicable time limits.

Plaintiff's original request for information was dated February 28, 1983. On March 7, 1983, the District Ranger wrote to plaintiff, asking him the intended use of the requested information. Plaintiff's response is dated March 14, 1983. By letter dated March 29, 1983, and mailed March 31, 1983, plaintiff's request was denied. Defendants failed to make a determination on plaintiff's request within the ten days allowed by the statute. Hence, plaintiff is deemed to have exhausted his administrative remedies, and this court has subject matter jurisdiction.

COLLATERAL ESTOPPEL

Plaintiff contends that collateral estoppel entitles plaintiff to judgment as a matter of law, since the issues and facts decided in the previous case are the same as those presented here; the parties are the

same, with the addition of William E. Butler; and the issues were actually litigated and decided. See, Lewis v. International Business Machines Corp., 393 F.Supp. 305, 307 (D.Ore. 1974).

In the previous case, plaintiff's request for names and addresses of private trip permittees on the Rogue River was denied by the Forest Service pursuant to Exemption 6 of FOIA, 5 U.S.C. § 552(b)(6). This court examined the nature of the information requested, the private and public interests served by its disclosure, and alternative means to the same end. It determined that the requested information did not come from personnel, medical or "similar" files, and that its disclosure would not constitute a clearly unwarranted invasion of personal privacy; therefore, it was not protected from disclosure by 5 U.S.C. § 552(b)(6).

The information plaintiff seeks in the instant case is not the same information he sought before. Whereas before he sought the names and addresses of permittees only, plaintiff now seeks disclosure of the names and addresses of all applicants for permits to float the Rogue River during the regulated period from Memorial Day through Labor Day. Of the 9,372 applicants for permits for the 1983 season, only 639 received permits. Plaintiff's stated purpose in requesting this information is to verify the fairness of the lottery. Defendants have presented evidence to show that disclosure of this information would not serve that purpose and that alternative means are available.

Since the facts and issues presented here are not the same ones decided previously by this court, collateral estoppel does not compel a judgment in favor of plaintiff. The issues will be re-

examined here in light of the new facts presented, and with reference to this court's previous ruling.

THE PRIVACY EXEMPTION

The personal privacy exemption of the FOIA applies to a request for information if (1) the information comes from personnel, medical, or similar files; (2) the disclosure of the information would constitute an invasion of personal privacy; and (3) the severity of the invasion would outweigh the public interest in disclosure. Sims v. Central Intelligence Agency, 642 F.2d 562, 573 (D.C.Cir. 1980). Four factors must be balanced in weighing claims of exemption for clearly unwarranted invasions of privacy: (1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of invasion of personal privacy; and (4) the availability of any alternative means of obtaining the requested information.

Church of Scientology v. U.S. Dept. of the Army, 611 F.2d 738, 746 (9th Cir. 1979). In its order in the previous case, this court decided that:

> the names and addresses of the private trip leader permittees for the regulated 1980 Rogue River season are not "similar" to personnel or medical files, that disclosure of the permittees' names and addresses would constitute a minimal invasion of personal privacy, that plaintiff has a private commercial interest and the public has an interest in disclosure which outweighs the minimal invasion, that no alternative means for obtaining the information is available to plaintiff, . . . and that the requested information is not exempt from disclosure under 5 U.S.C. [§ 552(b)(6)], . . . and that plaintiff's primary interest in requesting the names and addresses is commercial, . . .

Since this court's decision the United States Supreme Court decided the case of Dept. of State v. Washington Post Co., ___ U.S. ___, 102 S.Ct. 1957 (1982), in which it held:

> [We] do not think that Congress meant to limit Exemption 6 to a narrow class of files containing

> only a discrete kind of personal information. Rather, "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." H.R.Rep. No. 1497, supra, at 11, U.S. Code Cong. & Admin. News 1966, p. 2438. When disclosure of information which applies to a particular individual is sought from government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy.

102 S.Ct. at 1961. (Footnotes omitted.) The District of Columbia Circuit has interpreted this to mean that "[a]ll information which 'applies to a particular individual' is covered by Exemption 6, regardless of the type of file in which it is contained." Washington Post Co. v. U.S. Dept. of Health and Human Services, 690 F.2d 252, 260 (D.C.Cir. 1982). Both parties to this dispute agree that under the Supreme Court's ruling the information sought in this case is covered by Exemption 6 in that it comes from medical, personnel, or "similar" files. This court must still

determine if disclosure would constitute an unwarranted invasion of personal privacy.

In order to detemine if disclosure of the names and addresses of the applicants would constitute an unwarranted invasion of the applicants' personal privacy, the court must balance the public and private interest in the release of the information against the invasion of privacy, and consider alternative means to the same information. Plaintiff's private interest is a commercial interest in soliciting business for his lodge near the River. Plaintiff intends to serve the public interest by providing information about public accommodations within the wilderness area and by opening up the "secret" lottery conducted by the Forest Service and verifying its fairness. Defendants have submitted the affidavit of Kenneth M. Vines, Visitor Information Specialist at the Galice Ranger District, who is

responsible for administering the lottery. Vines states that the names and addresses of applicants can in no way explain or verify the fairness and accuracy of the lottery. Vines states that as part of his job he educates the public, either in person or through the media as to how the lottery system works and how to use it. The government has submitted a document explaining the lottery system and how the computer randomly selects from among the applicants. Furthermore, in the letter of March 29, 1983, denying plaintiff's request, the Regional Forester invited plaintiff to meet with the District Ranger and discuss the lottery.

Plaintiff does not explain how he intends to use this information to verify the fairness of the system. He argues that the list of names and addresses is necessary to verify that each applicant is actually put into the lottery system. There is a

public interest in assuring that each step in the lottery procedure is carried out fairly and carefully. It is possible that this interest can be served and the fairness ascertained without disclosing the names and addresses of all applicants, but certainly no harm is done in allowing citizen participation in making sure the procedure is fair.

This court previously held that the public had an interest in being informed about accommodations available along the River. This was in reference to plaintiff's request for the names and addresses of permittees, who would actually be travelling along the River. The information he now seeks includes the names of approximately 8700 people who did <u>not</u> receive permits for the summer season. However, these people are still free to float the River during the non-regulated part of the year, and the fact that they

applied for permits indicates that they are interested in the Rogue River and its recreational opportunities. The public interest in providing information about Rogue River accommodations to this class of people is still a compelling interest. The government points out that 57 percent of all applicants indicated on their applications that they preferred not to have their names and addresses disclosed for commercial or political purposes. The results of this poll are irrelevant for the purposes of this ruling.

Disclosure is favored under FOIA, and the exemptions are to be narrowly construed. Dept. of Air Force v. Rose, 425 U.S. 352, 361 96 S.Ct. 1592 (1976). The court finds the invasion of the personal privacy of the applicants to be minimal. Furthermore, the court finds that the public interest in disclosure outweighs the minimal invasion of privacy and that

there is no alternative means by which plaintiff can provide this information to this group of persons.

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is GRANTED. Defendants' motion for summary judgment is DENIED. Defendants are ordered to disclose the requested information to plaintiff.

DATED this 3 day of June, 1983.

Helen J. Frye
Unites States District Judge

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MARK G. MINNIS Plaintiff, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE, R. MAX PETERSON, individually and as Chief, United States Forest Service; R.E. WORTHINGTON, individually, and as Regional Forester, Region 6, United States Forest Service; and WILLIAM E. BUTLER, individually, and as District Ranger, Galice Ranger District, United States Forest Service Defendants.	)	Civil No. 83-469 JUDGMENT ORDER

This matter having come before the Honorable Helen J. Frye for hearing, on May 16, 1983 on cross-motions for summary judgment, and on July 11, 1983 on plaintiff's

motion for an award of attorneys fees and litigation costs, Jeffrey B. Wihtol and Cooney & Crew appearing in behalf of the plaintiff, and Judith Kobbervig, Assistant United States Attorney, appearing in behalf of defendants, and the Court having determined that plaintiff's request under the Freedom of Information Act for the names and addresses of the private permit applicants for the regulated 1983 Rogue River season is not exempt from disclosure pursuant to 5 USC § 552(b)(6), as claimed by defendants, and the Court further finding that plaintiff should be awarded his reasonable attorneys fees and litigation costs reasonably incurred herein against defendant United States Department of Agriculture pursuant to 5 USC § 552(a)(4)(E), it is therefore ordered, adjudged and decreed as follows:

1. Plaintiff's motion for summary judgment is allowed;

2. Plaintiff's motion for an award of reasonable attorneys' fees and litigation costs is allowed;

3. Defendants' Motion for Summary Judgment is denied;

4. Defendants shall immediately make available to plaintiff the names and addresses of the private permit trip applicants for the 1983 regulated Rogue River season.

5. Plaintiff shall have judgment against defendant United States Department of Agriculture for plaintiff's reasonable attorneys fees and litigation costs incurred herein, the exact sum and the reasons allowing said sum to be set forth re separate order.

6. The Court denies plaintiff's motion to invoke the provisions of 5 USC §552(a)(4)(F).

Dated this 12 day of Aug., 1983.

s/s Helen J. Frye
Helen J. Frye
U.S. District Court
Judge

PRESENTED BY:

/s/ Jeffrey B. Wihtol
Jeffrey B. Wihtol
Of Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MARK G. MINNIS, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, R. MAX PETERSON, and R.E. WORTHINGTON, Defendants.	)	Civil No. 80-1138 JUDGMENT ORDER

The above-captioned matter having come before The Honorable Helen J. Frye in the above-entitled court on Monday, April 13, 1981, on defendants' motions to dismiss or in the alternative for summary judgment, and for protective order, and plaintiff's motion for summary judgment, defendants appearing by their attorney Judith D. Kobbervig, and plaintiff appearing by his attorneys Morrison, Dunn, Cohen, Miller & Carney, and Jeffrey B. Wihtol, and the Court having determined that the names and addresses of the private trip leader permittees for the regulated 1980 Rogue

River season are not "similar" to personnel or medical files, that disclosure of the permittees' names and addresses would constitute a minimal invasion of personal privacy, that plaintiff has a private commercial interest and the public has an interest in disclosure which outweighs the minimal invasion, that no alternative means for obtaining the information is available to plaintiff, that defendants' refusal to disclose the requested information was not unreasonable, and that the requested information is not exempt from disclosure under 5 U.S.C. § 772b(6), and finding no need to punish defendants, and that plaintiff's primary interest in requesting the names and addresses is commercial, now, therefore, it is ordered and adjudged as follows:

1. Plaintiff's motion for summary judgment be and hereby is allowed;

2. Plaintiff's request for an award for attorney's fees is denied;

3. Defendant's motion to dismiss is allowed with respect to the individual defendants, R. Max Peterson, and R.E. Worthington, and that defendant's motion to dismiss or in the alternative for summary judgment is denied in all other respects;

4. Defendants' motion for a protective order is rendered moot by the foregoing rulings;

5. Defendant United States Department of Agriculture shall promptly make available to plaintiff the names and addresses of the private trip leader permittees for the regulated 1980 Rogue River season and plaintiff shall recover his costs and disbursements incurred herein.

DATED this 16 day of April, 1981.

s/s Helen J. Frye
United States District Judge

Presented by:

s/s Jeffrey B. Wihtol
Jeffrey B. Wihtol

Office - Supreme Court, U.S.
FILED
APR 3 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-663

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARK G. MINNIS, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In a prior lawsuit between the parties, the district court stated as one of the multiple grounds for its decision that the invasion of personal privacy resulting from disclosure of the names and addresses of *recipients* of recreational boating permits on the Rogue River during the *1980* regulated season was not "clearly unwarranted" within the meaning of Exemption 6 of the Freedom of Information Act. The questions presented are:

1. Whether the prior ruling bars the government's contention in this action that disclosure of the names and addresses of *applicants* for recreational boating permits on the Rogue River during the *1983* regulated season would result in a "clearly unwarranted" invasion of personal privacy.

2. Whether the collateral estoppel doctrine requires that dicta or alternative holdings contained in judicial opinions be accorded preclusive effect in subsequent litigation between the parties to the original action.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-663

MARK G. MINNIS, PETITIONER

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UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of petition for rehearing, is reported at 737 F.2d 784. The unamended opinion is reproduced at Pet. App. 4-15, and the court of appeals' amendatory order is reproduced at Pet. App. 2-3. The opinion of the district court (Pet. App. 16-29) is unreported. A judgment order of the district court entered in an earlier action between the parties (Pet. App. 34-37) is likewise unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1984. A petition for rehearing was denied on July 18, 1984. The petition for a writ of certiorari was filed on October 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Freedom of Information Act provides in pertinent part (5 U.S.C. 552(b)):

> This section does not apply to matters that are
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy * * *.

STATEMENT

1. Petitioner owns the Half Moon Bar Lodge, a commercial enterprise on the south Bank of the Rogue River in Oregon. Since enactment of the Wild and Scenic Rivers Act of 1968, 16 U.S.C. 1271 *et seq.*, the Rogue has been designated as a wild and scenic river. The United States Forest Service of the Department of Agriculture maintains the portion of the River involved here and "its immediate environment in a natural, wild, and primitive condition essentially unaltered by the effects of man" (37 Fed. Reg. 13412 (1972)). The designated wild part of the River is open to public use for boating without restriction during the off season. Between Memorial Day and Labor Day, however, all persons floating down the River must either be accompanied by one of 41 qualified commercial guides, regulated by the Bureau of Land Management, or obtain an individual permit from the Forest Service (Pet. App. 5; ER 59).[1] Some 9,372 persons applied for permits to float the Rogue during the 1983 season (Pet. App. 5; ER 56-57). Of those, 639 were drawn at random to receive float permits (*ibid.*).

2. On February 28, 1983, petitioner's counsel wrote to the Forest Service requesting "copies of the names and addresses of the private permit trip *applicants* for the 1983

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[1] "ER" denotes the Excerpt of Record prepared for use in the court of appeals.

regulated Rogue River Season" (ER 23-24; emphasis added). The Forest Service denied petitioner's request on March 29, 1983, on the ground that the names and addresses sought were protected from disclosure by Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6), because disclosure would result in a "clearly unwarranted invasion of personal privacy" (Pet. App. 5; ER 27).

3. Petitioner then filed a complaint under the FOIA in the United States District Court for the District of Oregon, seeking an order requiring disclosure of the requested names and addresses. The district court held (Pet. App. 16-29) that Exemption 6 was inapplicable here and directed that the Department of Agriculture disclose the names and addresses.

a. A threshold issue in district court was whether the government was precluded from raising an Exemption 6 defense by the doctrine of collateral estoppel. In a prior FOIA action, petitioner had successfully compelled the Department of Agriculture to disclose the names and addresses of float permit *recipients* only for the 1980 season. *Minnis* v. *United States Department of Agriculture*, Civ. No. 80-1138 (D. Ore. Apr. 16, 1981) (Pet. App. 34-37). In its judgment order in the 1981 case the district court recited that it had (*id.* at 34-35)

> determined that the names and addresses of the private trip leader permittees for the regulated 1980 Rogue River season are not "similar" to personnel or medical files, that disclosure of the permittees' names and addresses would constitute a minimal invasion of personal privacy, that [petitioner] has a private commercial interest and the public has an interest in disclosure which outweighs the minimal invasion, that no alternative means for obtaining the information is available to

> [petitioner] * * * and that the requested information is not exempt from disclosure under [Exemption 6] * * *.

The government did not appeal from the district court's order in the 1981 action.

In the present action the district court rejected petitioner's collateral estoppel argument and proceeded to rule on the merits, explaining that "the facts and issues presented here are not the same ones decided previously by this court" (Pet. App. 21). The court noted that petitioner's FOIA request in the prior case had been limited to actual permit recipients, and that the government had presented evidence to show that the new request, for the names and addresses of all applicants, would not serve petitioner's purported objective of verifying the fairness of the lottery by which permit recipients are chosen. *Ibid.*

b. Turning to the merits, the district court concluded that Exemption 6 did not shield the requested information from disclosure (Pet. App. 22-29). Initially the court acknowledged (*id.* at 23-25) that, contrary to its ruling in the 1981 action (see page 3, *supra*), the intervening decision in *United States Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982), had established that the records sought by petitioner were covered by Exemption 6 in that they were similar to medical or personnel files. However, the court concluded that disclosure of the contents of these files would not consitute a clearly unwarranted invasion of personal privacy prohibited by Exemption 6. The district court balanced the relevant privacy interests against the supposed public benefits of disclosure, considering four factors identified by the Ninth Circuit in *Church of Scientology* v. *Department of the Army*, 611 F.2d 738, 746

(1979) (Pet. App. 22-23).[2] Although the district court recognized that petitioner's "private interest is a commercial interest in soliciting business for his lodge" (*id.* at 25), it discerned a "compelling" public interest in dissemination of information about accommodations available along the River (*id.* at 28). Because it regarded the invasion of privacy involved as "minimal" and saw "no alternative means by which [petitioner] can provide this information to this group of persons," the district court held that Exemption 6 did not protect the names and addresses from disclosure (*id.* at 28-29).

4. a. The court of appeals reversed (Pet. App. 4-15), holding that the names and addresses of the permit applicants sought by petitioner were protected by Exemption 6. The court noted that, under *Washington Post Co.*, the agency files containing the requested information were "similar files" within the meaning of Exemption 6 (Pet. App. 6-7). Furthermore, the court concluded that "the invasion of privacy here is 'clearly unwarranted.' 5 U.S.C. § 552(b)(6)" (Pet. App. 14). The court of appeals observed that petitioner's "principal interest in obtaining the permit applicant list is purely commercial in character. He wants to advertise his lodge to people who are interested in visting the Rogue River" (*id.* at 8). This purpose, in the court of appeals' view, did not "weigh in favor of mandating disclosure of a name and address list" (*id.* at 9).

The public benefits of disclosure touted by petitioner were found to be insubstantial (Pet. App. 10-11). Petitioner had argued that his advertising to persons disclosed to him under the FOIA would inform the public about accommodations along the River and would also allow him "to verify

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[2]These factors are: "(1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of alternative means of obtaining the requested information." *Church of Scientology*, 611 F.2d at 746.

the fairness of the permit lottery system" (*id.* at 10). As to the first claim, the court of appeals found no public benefit because "some members [of the public] would be irritated rather than enlightened by unwanted solicitations" (*id.* at 10-11). The court also noted that there were numerous alternative means for petitioner to communicate his commercial message to the interested audience (*id.* at 11). As to scrutiny of the operation of the lottery system, the court of appeals found, on undisputed evidence, that disclosure of the names and addresses of permit applicants alone would not enable petitioner to verify the fairness of the system (*id.* at 11-12).

Moreover, the court of appeals found that "disclosure would implicate more than a minimal privacy interest" (Pet. App. 13). Disclosure would reveal various personal interests and could "subject[] the applicants to an unwanted barrage of mailings and personal solicitations" from other advertisers who could obtain the list (*id.* at 12-13).

b. The court of appeals also rejected petitioners' collateral estoppel argument. Initially, the court of appeals observed that the intervening inconsistent decision in *Washington Post Co.* prevented it from assigning preclusive effect to the district court's ruling in the 1981 action on the "similar files" issue. The court added that, in its 1981 ruling, the "district court never addressed whether disclosure would be 'clearly unwarranted.' " Pet. App. 15 n.1.

Petitioner then filed a petition for rehearing, observing (at 5-7) that the district court had in fact addressed the "clearly unwarranted" issue in its 1981 ruling, and arguing that the intervening decision in *Washington Post Co.* accordingly did not defeat operation of collateral estoppel. In response, the court of appeals amended its opinion (Pet. App. 2-3), deleting the statement that petitioner had challenged as erroneous. In its amended opinion the court of

appeals recognized that the district court had commented on the "clearly unwarranted" issue in its 1981 decision, but observed that those comments were unnecessary to the decision, and that they had been recognized as such by the district court. The court of appeals concluded that because these comments were mere dicta they had no preclusive effect in the present action. As a separate and independent reason for holding collateral estoppel inapplicable, the court of appeals observed that petitioner's first FOIA request had been limited to permit recipients whereas the one that gave rise to this suit extends to all permit applicants (Pet. App. 3).

ARGUMENT

Further review is plainly unwarranted here. Petitioner has not identified any decision of this Court or any court of appeals that conflicts with the ruling below as to the collateral estoppel effect of dicta or alternative holdings. Indeed, this Court's decision in *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984), slip op. 3 n.2, supports the ruling below, and that ruling is also supported by substantial policy considerations. In any event, petitioner did not make the arguments advanced in this Court before the court of appeals; this case accordingly is an inappropriate vehicle for considering those arguments. Finally, the ruling below that is the primary object of the petition was itself merely an alternative ground for the court of appeals' decision. There is no substance to petitioner's challenge to the court of appeals' conclusion that the FOIA issue presented in this action is too dissimilar to the issue in the prior round of litigation to warrant application of collateral estoppel. Accordingly, there is no occasion even to consider the question whether dicta and alternative holdings can acquire preclusive effect.

1. a. Petitioner's argument is directed primarily (see Pet. 11-19) to an implicit premise of the court of appeals' ruling on the collateral estoppel issue — *i.e.*, that dicta or alternative holdings have no preclusive effect. But the challenged premise was itself only one of two independent and sufficient grounds for the court of appeals' decision. The alternate ground for the decision was that the FOIA requests underlying the two successive lawsuits were insufficiently similar to permit application of collateral estoppel to the question whether the disclosure sought would produce a clearly unwarranted invasion of personal privacy. See page 7, *supra*. Because this Court reviews judgments rather than statements in the opinions that underlie them, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723 n.7 (1982), there is no reason even to consider the issue primarily addressed by petitioner, unless it is established that the court of appeals' alternative ruling is itself subject to serious question and otherwise worthy of further review. But that ruling in fact is clearly correct and consistent with the cases cited by petitioner (Pet. 19-22).[3]

b. Contrary to petitioner's assertion (Pet. 19) this case does not present "the same legal and factual issues" decided in the prior round of FOIA litigation. As the district court and the court of appeals observed (see pages 3-4, 7, *supra*), the FOIA request in this case is significantly broader than that which gave rise to the 1980 case; petitioner apparently is now seeking disclosure of well over ten times as many names and addresses. Plainly the determination whether an invasion of personal privacy resulting from government

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[3]We do not understand petitioner to challenge the court of appeals' conclusion that no preclusive effect attaches to the district court's 1981 ruling on the "similar files" issue. See Pet. 5. In any event, the intervening decision of this Court in *Washington Post Co.* clearly robs the earlier ruling of any such effect. See *Limbach* v. *Hooven & Allison Co.*, No. 83-96 (Apr. 18, 1984), slip op. 9.

disclosures under FOIA is "clearly unwarranted" is itself highly fact-bound. In this context the far greater scope of the 1983 FOIA request amply establishes that the prior ruling does not preclude consideration on the merits of the present request. Moreover, it is particularly significant for Exemption 6 purposes that the present request extends to permit applicants as well as permit recipients. The balance of public and private interests that is required by Exemption 6 of the FOIA could easily be different for the two kinds of groups. Cf. *Core* v. *United States Postal Service*, 730 F.2d 946, 948-949 (4th Cir. 1984).[4]

In any event, the same district judge who ruled in petitioner's favor in the 1981 action sat on the present case as well. Her fact-bound determination that the inquiry in this case differed sufficiently from that in the prior case to

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[4]Indeed, petitioner claimed that part of his purpose for seeking the names of applicants was to verify the fairness of the lottery. Although the district court found this factor inconclusive (Pet. App. 21, 26-27), and the court of appeals concluded that the information sought was insufficient to allow petitioner to achieve his stated purpose (Pet. App. 11-12), the fact remains that assessment of this contention was an integral part of deciding whether disclosure was warranted under Exemption 6. Thus plainly the 1980 and 1983 requests were not interchangeable for FOIA purposes and the district court's 1981 ruling did not control the question presented for decision in 1983.

In the Statement section of the petition, petitioner appears to argue (Pet. 9-10) that his 1983 FOIA request for the names of all permit applicants should have been viewed, in effect, as two separate requests — one for the names of rejected applicants and one for the names of permittees. It apparently is petitioner's theory that the courts below should have given collateral estoppel effect to the district court's 1981 comments on the "clearly unwarranted" issue, as to the latter subgroup. See Pet. 22. But petitioner did not in fact frame his FOIA request in this manner, and while the Act authorizes disclosure of segregable nonexempt portions of partially exempt documents (5 U.S.C. 552(b)), petitioner cites no authority requiring agencies — or reviewing courts — to recast an applicant's request in the fashion implied here.

preclude application of collateral estoppel, which was concurred in by the court of appeals, does not warrant further review.

c. Petitioner errs in relying (Pet. 19-22) on *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948). In *Sunnen* the Court took a narrow view of the scope of collateral estoppel (at least as it applies to tax litigation) (*id.* at 601; footnote omitted; emphasis added):

> [I]f the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. *But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.*

Sunnen thus contradicts rather than advances petitioner's argument concerning the standard for identity of issues necessary to invoke collateral estoppel.

Petitioner's reliance on *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67 (2d Cir. 1982), is likewise misplaced. In *Union Carbide Corp.* the Second Circuit, citing *Montana* v. *United States*, 440 U.S. 147 (1979), suggested (671 F.2d at 68) that the "separable facts" doctrine of *Sunnen* has been abandoned or moderated by this Court. Arguably that conclusion is supported — at least as to nontax cases —by *Montana*, see 440 U.S. at 158-163, and by *United States* v. *Stauffer Chemical Co.*, slip op. 4-7.[5] But there is

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[5]In *Stauffer Chemical Co.* the Court, citing *Sunnen*, reserved the question whether the separable facts doctrine may have special applicability in tax litigation. *Stauffer Chemical Co.*, slip op. 7 n.5. Thus *Union Carbide Corp.* — a tax case — may well entail an erroneous application of collateral estoppel.

no need here to explore whether and to what extent *Sunnen* remains good law because the ruling below does not rest on the separable facts doctrine. Rather, as we have explained above, the factual differences between the successive cases here are highly material to the legal issue presented for decision. Thus *Union Carbide Corp.*, in which the court determined that the "precise issue" (671 F.2d at 68) being litigated had previously been resolved adversely to the government in litigation with the same taxpayer, lends no support to petitioner's argument. Similarly, neither *Montana*, in which the Court found no "material[]" alteration of the pertinent "factual and legal context" (440 U.S. at 162), nor *Stauffer Chemical Co.*, in which the Court found that the government sought "to litigate twice with the same party an issue arising in both cases *from virtually identical facts*" (slip op. 7; emphasis added), supports petitioner's argument.

2. Petitioner's primary contention (Pet. 11-19) is that the court of appeals incorrectly declined to accord preclusive effect to statements in the district court's 1981 ruling addressing the "clearly unwarranted" issue — statements that petitioner characterizes as an alternative ground for that decision. Petitioner suggests that the court below erroneously followed recent decisions and scholarship suggesting that alternative holdings should be denied preclusive effect. As we have already explained, it would be unnecessary to reach this issue to sustain the court of appeals' judgment. But even if that were not so, there are numerous reasons why this case would provide no occasion for addressing the collateral estoppel effect of alternative holdings.

We note, preliminarily, that petitioner is correct insofar as he suggests that there is some disagreement among the lower courts and commentators as to whether a judgment predicated on alternate independent grounds is entitled to preclusive effect in subsequent litigation between parties.

As petitioner observes, the Restatement (Second) of Judgments adopts the position, contrary to that of the First Restatement, that such alternative holdings are not entitled to preclusive effect.[6] The Second Restatement follows the reasoning of the Second Circuit in *Halpern* v. *Schwartz*, 426 F.2d 102, 104-106 (1970). The Second Circuit there observed that because an alternative holding is, by definition, not essential to the judgment it supports, it may not have been afforded "rigorous consideration" (*id.* at 105). The court added that the presence of alternative grounds acts as a signficant disincentive to pursuit of appellate review by the losing party and accordingly undercuts an "important safeguard as to [the] correctness" of a judicial decision (*ibid.*). This is an inappropriate case in which to decide the question on which the First and Second Restatements disagree.

a. First, as petitioner concedes — indeed proclaims (Pet. 11, 23) — the "ruling" he challenges was made "without the benefit of briefing by the parties." The court of appeals' comments scarcely reflect a considered holding on the question of the preclusive effect of alternative holdings.[7] Rather, they were made in response to petitioner's rehearing petition, which pointed out a factual inaccuracy in the court of appeals' original opinion. See pages 6-7, *supra*. At no point in the proceedings below prior to entry of the order on rehearing did petitioner contend that alternative holdings are entitled to preclusive effect. Nor did petitioner seek leave to file a second petition for rehearing to place before the court of appeals the arguments raised in this Court.

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[6]Compare Restatement (Second) of Judgments § 27 comment i and reporter's note at 270 (1982), with Restatement of Judgments § 68 comment n (1942).

[7]Indeed, the Ninth Circuit appears to adhere to the rule announced in the First Restatement that assigns collateral estoppel effect to each of multiple alternative grounds for a decision. See *In re Westgate-California Corp.*, 642 F.2d 1174, 1176-1177 (1981) (dictum).

b. Second, the court of appeals did not purport even to comment on the question of the preclusive effect of alternative holdings, and the decision below will not be cited as precedent on that point. To the contrary, the court of appeals described the district court's comments on the "clearly unwarranted" issue in its 1981 ruling as "*dictum*" and emphasized that the district court "recognized that it was unnecessary for it to address that issue" (Pet. App. 3; emphasis added). So far as we are aware, there is no controversy as to the proposition that dicta are not entitled to preclusive effect in subsequent litigation.[8] And plainly this rule comports with the fundamental policy of collateral estoppel that limits preclusion to determinations that are essential to the judgments. Dicta, by their nature, pertain to issues not "conclusively determined in a prior action" (*Stauffer Chemical Co.*, slip op. 5). Petitioner ignores rather than disputes the court of appeals' characterization of the district court's 1981 comments as "dicta," rather than an alternative holding. In the circumstances, there is no reason to consider here whether alternative holdings should be given preclusive effect.

c. Were the question presented, strong arguments could be adduced for the rule that alternative holdings generally should not be given preclusive effect. The reasoning of the Second Circuit in *Halpern* v. *Schwartz*, see page 12, *supra*, is persuasive and in accord with the general rule that preclusion should be limited to matters that a party had full and fair opportunity to litigate in a prior action. See *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980). It would be inconsistent with the objective of judicial economy, which preclusion is intended to serve, to require parties to take an appeal

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[8]On this point the Restatement (Second) of Judgments § 27 comment h and reporter's note at 269-270, continues the approach of the First Restatement, § 68 comment *o*.

challenging a judgment resting on alternative grounds simply to prevent one of those grounds from acquiring preclusive effect in future litigation. And such a rule would be especially inappropriate as applied to the United States. See *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 6-7.

We note, as well, that in *Stauffer Chemical Co.*, this Court appears to have endorsed the position that petitioner challenges here. There Stauffer raised its estoppel argument for the first time on appeal in the second action, even though the first action had been decided in its favor by the district court before the second action was decided by the district court. This Court held that Stauffer's tardy assertion of collateral estoppel was permissible in the circumstances of the case, explaining (slip op. 3 n.2):

> Although the Wyoming District Court had decided *Stauffer I* by the time the Tennessee District Court decided this case, it had relied on alternate grounds for its decision. * * * By the time this case reached the Sixth Circuit, however, the Tenth Circuit had affirmed the District Court in *Stauffer I* solely on the ground [as to which estoppel was invoked by Stauffer].

Finally, the cases cited by petitioner (Pet. 16-18) do not in fact demonstrate any settled conflict among the courts of appeals. Rather, as petitioner himself observes (Pet. 16-17), decisions in the Second Circuit subsequent to *Halpern* v. *Schwartz* suggest that *Halpern* may be limited to its facts. *Winters* v. *Lavine*, 574 F.2d 46, 67 (2d Cir. 1978); *Williams* v. *Ward*, 556 F.2d 1143, 1155 (2d Cir.), cert. dismissed, 434 U.S. 944 (1977). Similarly, the District of Columbia Circuit has noted a divergence of views on this point but, as petitioner recognizes (Pet. 18), has found it unnecessary to decide the point. *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1195 (1983). On the other hand, *Halpern* itself suggests that

cases generally cited in support of the proposition that preclusive effect attaches to alternative holdings do not in fact support that general proposition. See 426 F.2d at 107 & n.4; see also Restatement (Second) of Judgments § 27 reporter's note at 270. Thus, resolution of the issue would be aided by further development in the lower courts. See *Mendoza*, slip op. 6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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